Supreme Court, U.S.
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90-1376

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ST. JOHN'S HOSPITAL and DR. SHARI FITZGERALD,

Petitioners,

v.

ERICA HENRY, by her Mother and Next Friend, JANE HENRY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented for review is as follows:

Did the Supreme Court of Illinois deprive Petitioners of their constitutional right to due process and equal protection of the law under the Fourteenth Amendment of the United States Constitution by upholding a lower court's post-trial rulings which *increased* the jury's verdict against Petitioners from $595,821.13 to $5,511,759.00?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW ...	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	12
THE ILLINOIS SUPREME COURT OPINION, UPHOLDING THE LOWER COURT'S TEN-FOLD INCREASE IN THE JURY'S VERDICT AGAINST PETITIONERS, VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FOURTEENTH AMENDMENT	12
A. The Fourteenth Amendment Prohibits States, Including State Courts, From Arbitrarily Denying Their Citizens The Rights Granted Them By State Law ..	13
B. The Illinois Supreme Court Denied Petitioners' Their "Right To The Verdict Of The Jury"	14
1. The Jury Did Not Return A Joint And Several Verdict	14
2. The Jury's Verdict Is What It Is And It May Not Constitutionally Be Increased To Comport With Law Which The Jury Was Never Given And Did Not Follow ..	15

3. The Instant Decision Of The Illinois Supreme Court Does Violence To Petitioners' Constitutional Rights 18

4. If Allowed To Stand, The Illinois Supreme Court Opinion Will Serve As Precedent For Similar "Unexplained Manueverings" To Deprive A Litigant Of His Constitutional Right 19

CONCLUSION 20

APPENDIX

(Separate Volume)

		App. Page
1.	Opinion of the Supreme Court of Illinois (138 Ill.2d 533)	1
2.	Opinion of the Appellate Court of Illinois (180 Ill.App.3d 558)	23
3.	Opinion of the Appellate Court of Illinois (159 Ill.App.3d 725)	42
4.	Order Denying Petition for Rehearing	54
5.	Verdict of the Jury	55
	Correspondence from Circuit Court Judge	56
	Docket Entry Sheet	57
6.	Appeal Bond	59
7.	Special and Limited Appearance	61
8.	Petition for Instructions	64
	Order Denying Petition	66
	Order Dismissing and Vacating Judgment	67
9.	Petition for Rehearing	68
10.	Petition for Entry of Judgment Pursuant to Jury Verdict or in the Alternative Petition for Relief from Judgment Pursuant to Section 2-1401, Chapter 110	71
11.	Order Denying Petition for Entry of Judgment	74
12.	Appellant's Brief	76
13.	Petition for Rehearing	77

TABLE OF AUTHORITIES

Cases	Page
American Ry. Express Co. v. Bender, 20 Ohio App. 436, 152 N.E. 197	17
Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930)	13
Coney v. J.L.G. Industries, 97 Ill. 2d 104, 454 N.E.2d 197 (1983)	15
Detroit City Gas Co. v. Syme, 109 F.2d 366 (6th Cir. 1940)	17
Dimick v. Schiedt, 293 U.S. 474 (1935)	14, 16, 17
Duewel v. Lahman, 103 Ill. App. 3d 220, 430 N.E. 2d 662 (1981)	17
Fidelity Storage Co. v. Kingsbury, 65 App. D.C. 69, 79 F.2d 705 (1935)	17
Gaither v. Wilmer, 71 Md. 361, 18 A. 590 (1889)	17
Johnson by Johnson v. Brelje, 701 F.2d 1201 (7th Cir. 1983)	13
Koltz v. Jahnaske and Reher, 312 Ill. App. 623, 38 N.E.2d 973 (1942)	16, 17
Landon v. National Building Corporation, 415 F. 2d 860 (6th Cir. 1969)	17
Mills v. Rogers, 457 U.S. 291 (1982)	13
New York City Transit Authority v. Beazer, 440 U.S. 568 (1979)	13
Rafferty v. Public Service Interstate Transp. Co., 13 N.J. Misc. 80, 177 A. 357 (1934)	17
Shelley v. Kramer, 334 U.S. 1 (1948)	13
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	13

Constitutional Provisions

United States Constitution, Amendment XIV ... 2, 9
Illinois Constitution, Article 1, §13 ..... 2, 9, 13

Other Authorities

Illinois Contribution Act, Ill. Rev. Stats.
Ch. 70, §301 *et seq.* 3, 7

In The

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ST. JOHN'S HOSPITAL and DR. SHARI FITZGERALD,

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ERICA HENRY, by her Mother and Next Friend, JANE HENRY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

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OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 138 Ill.2d 533 and 563 N.E.2d 410 (1990) (App. 1 at pp. 1-22). The opinion of the Supreme Court of Illinois reversed the opinion of the Appellate Court of Illinois, Fourth District, which is reported at 180 Ill. App. 3d 558 and 536 N.E.2d 221 (1989) (App. 2 at pp. 23-41). Petitioners filed a Petition for Rehearing in the Supreme Court of Illinois (App. 13 at pp. 68-70). The Supreme Court of Illinois issued an order denying the Petition for Rehearing (App. 4 at p. 54).

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on September 19, 1991. Petitioners' timely Petition for Rehearing was denied by the Supreme Court of Illinois on November 30, 1991, and the modified judgment of the Supreme Court of Illinois was entered on that date. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are contained in Article 1, §13 of the Illinois Constitution and §1 of Amendment XIV of the United States Constitution as follows:

> "The right of trial by jury as heretofore enjoyed shall remain inviolate." (Illinois Constitution Art. 1, §13)
>
> "Section 1. . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (United States Constitution, Amendment XIV)

STATEMENT OF THE CASE

Respondent, Erica Henry, by her Mother and Next Friend Jane Henry, instituted this action in the Illinois Circuit Court for the Seventh Judicial Circuit, Sangamon County, Illinois. Respondent sought to recover for injuries

Erica allegedly sustained from the drug Marcaine, which was administered to Jane shortly before she gave birth to Erica.

The Parties

Respondent's complaint alleged theories of medical malpractice and products liability against the following defendants:

1) Dr. Shari Fitzgerald and her employer St. John's Hospital[1] (hereinafter "Petitioners") on the theory that Dr. Fitzgerald should not have administered Marcaine to Erica's mother;

2) Sterling Drug, Inc. and Breon Laboratories, Inc. (hereinafter collectively referred to as "Sterling/Breon") the manufacturer and distributor of Marcaine, on a theory of strict product liability for marketing an unreasonably dangerous drug, and on a theory of willful and wanton conduct on the ground that Sterling/Breon knew of the dangers of Marcaine, but failed to adequately warn physicians, hospitals and other users of the danger.[2]

Jury Not Instructed On Joint And Several Liability, Nor Given A Joint And Several Liability Verdict Form

Both the Illinois common law and the Illinois Contribution Act, Ill. Rev. Stats., Ch. 70, §301 *et seq.* recognize

[1] St. John's Hospital is incorporated as St. John's Hospital of the Hospital Sisters of the Third Order of St. Francis, an Illinois not-for-profit corporation. Its parent company is Hospital Sisters Services Inc.

[2] Respondent also sued her pediatrician, Dr. Thomas O'Hern, but he received a directed verdict at the close of the evidence and had no further involvement in the case.

the principle of joint and several liability whereby each defendant, regardless of his percentage share of fault, remains fully liable to the plaintiff for 100% of the total compensatory damages. Accordingly, the standard Illinois jury instructions found in the Illinois Pattern Instructions (I.P.I.) include instructions and verdict forms reflecting this joint and several liability principle. *See* I.P.I. 2d §14.04.[3]

Nevertheless, even though Sterling/Breon had filed a contribution claim against Petitioners and contribution instructions were given, the instant jury was told to "decide each defendant's case separately as if each were a separate lawsuit" (R. C3287) and was never instructed on the principle of joint and several liability. Nor was the jury ever given a joint and several liability verdict form. Instead, Respondent's counsel drafted and the trial court submitted to the jury one plaintiff's verdict form that instructed the jury to allocate each defendant's "pro-rata share of compensatory damages" in "find[ing] *for the plaintiff*" (emphasis added) (App. 5 at p. 55).

The reason why Respondent never tendered joint and several liability instructions or verdict forms was never stated of record, but the tactical reason was obvious. Respondent's counsel focused almost his entire case on Sterling/Breon, even going so far as to argue in closing argument that "I think that Dr. Fitzgerald is as much a victim of that drug company as the child is" (R. Vol. XXV, p. 33). Respondent's counsel apparently concluded that instructing the jury that Petitioners would be fully respon-

[3] This pattern instruction provides: "If you find that the plaintiff is entitled to recover against more than one defendant, then your verdict against those defendants whom you find to be liable must be in one, single sum."

sible for the entire amount of any compensatory damage award, might have reduced the compensatory damages that the jury was otherwise willing to award against Sterling/Breon.

Separate Jury Verdicts Returned In Favor Of Plaintiff And Against Petitioners And Sterling/Breon For Separate Percentages Of Plaintiff's Compensatory Damages

In accordance with the jury verdict form asking the jury to determine each defendant's separate "pro-rata share of compensatory damages" in their verdict for the plaintiff, the jury returned its separate verdicts in favor of plaintiff and against Petitioners and against Sterling/Breon as follows:

> "We, the jury, find for the plaintiff and against the following defendants and determine their pro rata share of compensatory damages in the following amounts:
>
> | | |
> |---|---|
> | Sterling Drug, Inc. | 46.5% |
> | Breon Laboratories, Inc. | 46.5% |
> | St. John's Hospital/ Dr. Shari Fitzgerald | 7.0% |
> | TOTAL | 100.0%" |
>
> * * * * *
>
> "We, the Jury, find for the plaintiff and assess compensatory damages as follows:
>
> | | |
> |---|---|
> | Disability | $6,000,000.00 |
> | Disfigurement | 1,000,000.00 |
> | Pain & Suffering | 1,500,000.00 |
> | Medical Expenses | 1,500,000.00 |
> | Total | $10,000,000.00" |

(App. 5 at p. 55)

In addition, the jury returned a $7,000,000 punitive damage award against Sterling/Breon only (App. 5 at p. 57).

Initial Post-Trial Proceedings Recognize The Separate Nature Of The Verdicts

Judgment was entered in favor of Respondent on the jury's separate pro-rata verdicts in the exact form of the verdict itself, awarding Respondent 7% of her total compensatory damages against Petitioners and 93% of her total compensatory damages against Sterling/Breon (App. 5 at p. 57). Subsequently, the total compensatory damages were reduced from $10 million to $8,511,759.00 in a letter order "granting judgment for the plaintiff and against the defendants for the sum of $8,511,759.00 for compensatory damages" (App. 5 at pp. 56 and 58).

Thereafter, in accordance with the separate nature of the jury's pro-rata verdicts, the parties and the court continued to treat the verdict and judgment against Petitioners for 7% of the compensatory damages as a separate and distinct verdict from the verdict against Sterling/Breon for 93% of the compensatory damages. Accordingly, the trial court approved appeal bonds limited to each defendant's share of the compensatory damages. The court approved Petitioners' appeal bond in the amount of $625,000 representing its pro-rata 7% share of Respondent's total compensatory damages plus anticipated post-judgment interest (App. 6 at pp. 59-60). Likewise, the court approved a separate appeal bond for Sterling/Breon in the amount of $16,500,000 representing its 93% share of the compensatory damage award plus expected post-judgment interest plus the punitive award (R. C2842).

Respondent And Sterling/Breon Enter Into Settlement Agreement

While the case was on appeal, Respondent and Sterling/Breon entered into a settlement of the compensatory damage and punitive damage judgments against Sterling/Breon. Respondent received a structured settlement package costing Sterling/Breon $3,350,000 (R. C2888-2891). As part of the settlement, Respondent and Sterling/Breon sought a finding from the Circuit Court that the settlement was in "good faith" under the Illinois Contribution Act, Ill. Rev. Stat., Ch. 70, §301 *et seq.*, thereby extinguishing any contribution claims by or against Sterling/Breon (R. C2888).

Since the Contribution Act is premised on a theory of joint and several liability, Petitioners immediately filed a special and limited appearance, voicing their concern and constitutional objections should Respondent intend to use the settlement as a premise for the assertion that Petitioners were jointly and severally liable for that portion of the compensatory damage award against Sterling/Breon that remained unpaid after the settlement (App. 7 at pp. 61-63). Respondent objected to Petitioners' standing, and Petitioners' objections to the good faith finding were overruled (App. 5 at p. 58). Petitioners attempt to appeal from the good faith finding was dismissed as premature (R. C2900).

The Appellate Court Expressly Recognizes The Separate Nature Of The Judgment Against Petitioners For 7% Of Compensatory Damages

On appeal, Petitioners sought outright reversal of the judgment on the jury's verdict or a new trial. The Appellate Court ultimately rejected all of Petitioners' appeal

arguments and affirmed. In view of the Sterling/Breon settlement, Petitioners filed a Petition for Rehearing in the Appellate Court expressly requesting the Appellate Court to acknowledge that the affirmance did not change or increase the jury's verdict finding Petitioners' liable for only 7% of the total compensatory damages (App. 9 at pp. 68-70).

The Appellate Court complied with Petitioners' request and filed an amended opinion stating that it affirmed Petitioners' "responsibility for 7%" of the compensatory damages (159 Ill. App. 3d at 735) (App. 3 at p. 53). Respondent filed no objection and sought no further appeal from this amended affirmance order for 7% of the compensatory damages.

Increased Judgment Entered Against Petitioners For $5,511,759.00 Plus Interest

After the Appellate Court had affirmed Petitioners' "responsibility for 7%" of the compensatory damages and Petitioners' petition for leave to appeal to the Illinois Supreme Court had been denied, Petitioners tendered Respondent a check in the amount of $715,559.09, representing Petitioners' 7% share of the compensatory damage award plus post-judgment interest at the statutory rate (R. C2954).

In response, Respondent filed citation proceedings against Petitioners and Petitioners' umbrella insurance carrier asserting that Petitioners were jointly and severally liable for $5,511,759—the amount of the compensatory damage verdict against Sterling/Breon that remained unpaid after the Sterling/Breon settlement (R. C2922).

Petitioners responded by filing a formal petition for entry and satisfaction of the judgment against Petitioners pursuant to the jury's original separate verdict for 7%

of the compensatory damages, and a petition for post-trial relief from judgment pursuant to the Illinois Code of Civil Procedure, Ch. 110, §2-1401, to the extent any prior judgment entered on the jury verdicts failed to comply with the jury's separate verdicts (R. C2945). Petitioners urged that their right to a jury trial under the Illinois Constitution (Article I, §13) and the Fourteenth Amendment of the United States Constitution prohibited the entry of any judgment against Petitioners in excess of the separate "7% of compensatory damages" verdict returned by the jury (App. 10 at pp. 71-73).

The Circuit Court denied all of Petitioners' motions and objections and entered a new order that expressly: (a) found that Petitioners were jointly and severally liable for all the compensatory damages found by the jury; and (b) entered a new judgment against Petitioners in the total amount of $5,511,759.00 plus interest for a total judgment of $7,040,502.00 (App. 11 at pp. 74-75).

The Appellate Court Reverses The Increased Judgment Against Petitioners

On March 17, 1989, the Appellate Court of Illinois reversed the new $5,511,759.00 judgment against Petitioners and held that Respondent had no right "to enforce that part of the verdict attributable to Sterling/Breon" against Petitioners (180 Ill. App. 3d at 569) (App. 2 at p. 35).

The Illinois Supreme Court Reverses The Appellate Court And Reinstates The Increased Judgment Against Petitioners

On September 19, 1990, the Illinois Supreme Court issued an opinion wherein the majority of the court reversed the Appellate Court and reinstated the increased

$5,511,759.00 judgment against Petitioners. The Supreme Court cited the Illinois law of joint and several liability, brushing aside Petitioners' contention that any judgment against Petitioners for more than the jury's verdict of 7% of the compensatory damages was "an improper post-judgment reallocation of the jury verdict" (138 Ill. 2d at 549) (App. 1 at p. 14). Supreme Court Justice Ryan filed a vigorous dissent, concluding that the "unexplained maneuvering" between Respondent and Sterling/Breon was a misuse of the Illinois Contribution Act which resulted in an "unconscionable" and "inequitable" result wholly inconsistent with the jury's verdict against Petitioners for only 7% of the compensatory damages (138 Ill. 2d at 550-556) (App. 1 at pp. 16-22).

Rehearing was denied by the Illinois Supreme Court and a modified opinion was entered on November 30, 1990 (App. 4 at p. 54). Accordingly, Petitioners now file this Petition for Writ of Certiorari since this Court is the court of last resort for the constitutional deprivation which has occurred.

How The Constitutional Questions Were Raised

The constitutional questions herein did not arise until Petitioners learned that Respondent and Sterling/Breon had entered into a settlement for substantially less than the judgment against Sterling/Breon and sought approval of the settlement as well as a "good faith" finding from the Circuit Court that would extinguish any contribution claims by or against Sterling/Breon. Petitioners immediately filed a special and limited appearance voicing their concern and constitutional objections should Respondent plan to later assert that Petitioners were jointly and severally liable for the unpaid portion of the compensatory

damage award (App. 7 at p. 61). The Circuit Court overruled Petitioners' objections (App. 5 at p. 58). Petitioners next filed a Petition for Instructions in the Appellate Court, again voicing constitutional concerns (App. 8 at p. 64). The Appellate Court overruled the Petition (App. 8 at p. 66). Thereafter, the Appellate Court affirmed the judgment against Petitioners, and Petitioners filed a Petition for Rehearing expressing the same concerns and asking the Appellate Court, if it denied the Petition, to clarify that it was only affirming Petitioners' "responsibility for 7%" of the compensatory damage award (App. 9 at pp. 68-70). The Appellate Court modified its opinion and expressly affirmed Petitioners' "responsibility for 7%," implicity accepting Petitioners' constitutional arguments (159 Ill. App. 3d at 735) (App. 3 at p. 53).

Petitioners next filed a Petition for Entry of Judgment or Relief from Judgment raising the same constitutional concerns (App. 10 at pp. 71-73). The Circuit Court denied the Petition and *for the first time* entered an Order finding Petitioners liable for the unpaid portion of the jury's separate verdict against Sterling/Breon. Accordingly, the Circuit Court entered a new judgment against the Petitioners for $5,511,759.00 plus interest for a total award of $7,040,502.00 (App. 11 at p. 74). Petitioners appealed from this new *increased* judgment, and in their Appellant's Brief urged that affirmance of this judgment would be inconsistent with the Fourteenth Amendment (App. 12 at p. 76). The Appellate Court reversed the Circuit Court citing different grounds (180 Ill. 2d 558) (App. 2 at pp. 23-41). Respondent then appealed to the Illinois Supreme Court from the Appellate Court decision, and the Illinois Supreme Court reversed the Appellate Court and affirmed the judgment against Petitioners for the unpaid portion of the jury's 93% compensatory damage verdict against Sterling/Breon (138 Ill. 2d 533) (App. 1 at pp. 1-22). Peti-

tioners filed a Petition for Rehearing arguing that they had been denied their rights as guaranteed by the Fourteenth Amendment (App. 13 at p. 77). The Illinois Supreme Court denied the Petition, implicitly rejecting Petitioners' arguments (App. 4 at p. 54). This petition for a writ of certiorari followed.

ARGUMENT

THE ILLINOIS SUPREME COURT OPINION, UPHOLDING THE LOWER COURT'S TENFOLD INCREASE IN THE JURY'S VERDICT AGAINST PETITIONERS, VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Petitioners recognize that this Court rarely issues a writ of certiorari to review a state court tort case. However, it is equally rare for a court to do what the Illinois Circuit Court did here when, after the jury trial in this medical malpractice case was over and the jury was discharged, it *increased* the jury's verdict against Petitioners and the judgment thereon from $595,812.13 to $5,511,759.00. It is even more rare for a court of review to approve such a procedure. But the Illinois Supreme Court did precisely that. In an opinion that the dissenting Supreme Court Justice aptly labeled "terribly wrong" and "unconscionable," the Illinois Supreme Court reversed the Appellate Court and reinstated the increased $5,511,759.00 award against Petitioners for an amount 10 times the jury's verdict. This result is not only unjust and unconscionable, it is unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

A. The Fourteenth Amendment Prohibits States, Including State Courts, From Arbitrarily Denying Their Citizens The Rights Granted Them By State Law.

The Fourteenth Amendment of the United States Constitution guarantees the right to due process and equal protection of the laws. Denial of these federal guarantees can be accomplished by a state court. As this Court noted in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930):

> The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.

See also, Shelley v. Kramer, 334 U.S. 1, 15 (1948), and the cases cited therein.

While the United States Constitution affords the individual certain rights, "[s]tate law may recognize liberty interests more extensive than those independently protected by the Federal Constitution." *Mills v. Rogers*, 457 U.S. 291, 300 (1982). Once the state creates such rights they are entitled to due process protection (*Id.*) A state created right is entitled to the protection of the federal due process clause. *Johnson by Johnson v. Brelje*, 701 F.2d 1201, 1205 (7th Cir. 1983).

State law rights must so be applied "impartially." *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979). Accordingly, an individual may be deprived of his right to equal protection where a state law fair on its face is applied unequally. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

Under Illinois law, the Illinois Constitution provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate." (Ill. Const. Art. I, §13). The Seventh

Amendment of the United States Constitution affords this same right to trial by jury in the federal courts. As stated by this Court in *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935):

> The right of trial by jury is of ancient origin, characterized by Blackstone as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy" (Bk. 3, p. 379); and, as Justice Story said (2 Story on the Constitution, §1779), ". . . the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

The *Dimick* Court further noted that this right to a jury trial includes the fundamental "right to the verdict of the jury." *Ibid.* at p. 487.

B. The Illinois Supreme Court Denied Petitioners' Their "Right To The Verdict Of The Jury."

1. The Jury Did Not Return A Joint And Several Verdict.

The only jury verdict in favor of Respondent and against Petitioners in this case was a verdict expressly finding that Petitioners were liable to Respondent for 7% "pro-rata share of compensatory damages," and that the total amount of compensatory damages was $10 million, later reduced by remittitur to $8,511,759.00.

After the trial was over and the jury had been discharged, all parties, the trial court, and the appellate court continued to treat the verdicts as the separate verdicts they were. Specifically, the trial court accepted Petitioners' appeal bond in the amount of 7% of the total compensatory award plus interest on said 7%, even though under joint and several liability principles Petitioners would have been obligated to bond the entire award. Likewise, the Appellate Court's final judgment order carefully noted that it was affirming Petitioners' "responsibility for 7%" of the compensatory award.

2. The Jury's Verdict Is What It Is And It May Not Constitutionally Be Increased To Comport With Law Which The Jury Was Never Given And Did Not Follow.

The plaintiff's verdict form submitted to the jury, permitting the jury to return a verdict for plaintiff by allocating different percentages of the compensatory damages award to each defendant, did *not* comport with the Illinois general rule of joint and several liability precluding the apportionment of compensatory damages among joint tortfeasors. *Coney v. J.L.G. Industries*, 97 Ill. 2d 104, 454 N.E.2d 197 (1983). Yet, it was Respondent's counsel who drafted the verdict form permitting—indeed requiring—apportionment in the verdict finding in favor of Respondent. Furthermore, Respondent's counsel did not submit and the trial court did not give the standard Illinois pattern jury instruction advising the jury of the joint and several liability principle. Nor was any joint and several liability verdict submitted.

But even if Respondent had not been the one responsible for the jury's failure to return a joint and several verdict, the constitutional principle would remain the same,

i.e., the jury's verdict is what it is and it cannot be judicially increased to comport with any view of what the jury should have done.

Thus, in *Dimick v. Schiedt*, *supra*, this Court held that an increase in the jury's verdict in a personal injury case violated the parties' constitutional right to a jury trial even when done with the consent of the defendant in an attempt to correct a verdict "made by a jury which has acted improperly." 293 U.S. at 487.

Prior to the instant case, Illinois courts had reached the same conclusion based on every Illinois citizen's constitutional right to a jury trial. In *Koltz v. Jahaaske and Reher*, 312 Ill. App. 623, 38 N.E.2d 973 (1942), a personal injury case was tried against multiple defendants on a joint and several liability theory. Nevertheless, the jury returned separate and different amounts against various defendants. The lower court, relying on the principle of joint and several liability, "corrected" the verdicts by making each verdict equal to the highest damage award returned by the jury. The Appellate Court found such a result "violative of the constitutional guaranty of trial by jury" and reversed, stating:

> The verdict is the basis for the judgment to be rendered thereon, and a *court cannot render judgment* in an action for unliquidated damages, *for a greater amount than it is authorized to do by the verdict.* The rule that a trial court is powerless to reduce the damages fixed by a jury in its verdict in an action for unliquidated damages, and render judgment for a less amount, unless the party in whose favor the verdict was rendered consents to such reduction, is so generally recognized that it may be said to be of universal application. Likewise, a trial court is without power to arbitrarily increase the verdict of a jury in a tort action which is based upon unliquidated

damages, without the consent of the party to be unfavorably affected by such increase. The reason for the above rule is that such action on the part of the court in arbitrarily reducing or increasing the damages fixed by the jury in its verdict without the consent of the party unfavorably affected by such increase or decrease, *would be violative of the constitutional guaranty of trial by jury. American Ry. Express Co. v. Bender*, 20 Ohio App. 436, 152 N.E. 197; *Dimick v. Schiedt*, 293 U.S. 474, 55 S. Ct. 296, 79 L.Ed 603, 95 A.L.R. 1150; *Gaither v. Wilmer*, 71 Md. 361, 18 A. 590, 5 L.R.A. 756, 17 Am. St. Rep. 542; *Fidelity Storage Co. v. Kingsbury*, 65 App. D.C. 69, 79 F.2d 705; *Rafferty v. Public Service Interstate Transp. Co.*, 177 A. 357, 13 N.J. Misc. 80. (312 Ill. App. at 627, 38 N.E.2d at 975) (Emphasis added).[4]

Similarly, in *Dueuel v. Lahman*, 103 Ill. App. 3d 220, 430 N.E.2d 662 (1981), the jury ignored its joint and several liability instructions and returned a verdict against two defendants "in the sum of $27,500 each." In accord with the law of joint and several liability, the trial court entered judgment against each defendant for $54,000. Again,

[4] For additional cases announcing the same rule, *see also, Landon v. National Building Corporation*, 415 F.2d 869 (6th Cir. 1969), holding that where jury found that defendants were 65% and 25% liable, and that 10% of liability was attributable to "other causes," district judge's distribution of the 10% of liability attributed to "other causes" between said defendants deprived defendants of their right to a jury trial; *Detroit City Gas Co. v. Syme*, 109 F.2d 366 (6th Cir. 1940), holding that where jury verdict found each of two defendants liable for $5,000 there was error in entering a judgment which subjected each of the defendants to a joint liability of $10,000, even though jury had failed to follow proper instruction that the verdict had to be returned in one lump sum, noting that "the amount found against each defendant is the very essence of the verdict and the amount awarded cannot be stricken out without destroying the verdict in its entirety."

the Illinois court disapproved this attempt to correct the jury verdict, and ordered a new trial.

3. The Instant Decision Of The Illinois Supreme Court Does Violence To Petitioners' Constitutional Rights.

The Illinois Supreme Court's affirmance of the increased verdict against Petitioners in this case flies in the face of each of the above decisions and the constitutional principles espoused therein. Petitioners were entitled to a jury trial under the Illinois Constitution. The due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution entitled Petitioners to have the Illinois court system protect and enforce that right as it does for all other Illinois citizens. The jury's verdict in favor of Respondent and against Petitioners for "7% of the compensatory damages" constitutionally permitted the lower court to enter judgment for no more than $595,812.13 or order a new trial.

In short, a court is constitutionally empowered to enforce a personal injury verdict, to set it aside and order a new trial, or to order a remittitur lowering the verdict—but it cannot constitutionally increase the verdict. Nevertheless, the lower court ultimately entered a judgment against Petitioners for 10 times the amount of the jury's verdict ($5,511,759.00) and the Supreme Court of Illinois approved this increase in the jury's verdict. The constitutional violation is blatant, the result is "unconscionable," and the last chance for relief now lies with this Court.

4. If Allowed To Stand, The Illinois Supreme Court Opinion Will Serve As Precedent For Similar "Unexplained Manueverings" To Deprive A Litigant Of His Constitutional Right.

A large number of states now recognize some form of contribution. *See* Uniform Laws Annotated, Uniform Contribution Among Tortfeasors Act. If allowed to stand, the Illinois Supreme Court opinion will be a catalyst for other parties in other lawsuits across the country to engage in "unexplained manueverings" (138 Ill. 2d at 550-556) (App. 1 at pp. 16-22), similar to those engaged in here by Respondent and Sterling/Breon to frustrate the intent of the contribution doctrine, to rewrite the jury's verdict, and to do violence to the jury's intent. The end result will be more "terribly wrong" results like this one which is both "inequitable" and unconstitutional (138 Ill. 2d at 550-556) (App. 1 at pp. 16-22).[5]

[5] Justice Ryan, dissenting in the Illinois Supreme Court, expressed his "fear" that courts were being "too casual[]" in assessing the "good-faith" requirement of settlement under the Contribution Act. He noted that this was an especial concern in post-judgment settlements: "Settlement agreements should not be used as an instrument of conspiracy to "gang up on" a nonsettling defendant, thereby shifting a substantial part of the liability to one not a party to the agreement. This is particularly true where, as in this case, there has been a determination that the nonsettling defendant is much less culpable than the settling defendant and the result of the settlement shifts the major share of the damages to the less responsible defendant." (138 Ill. 2d at 552-553) (App. 1 at pp. 18-19).

CONCLUSION

Where State law guarantees a right to trial by jury, State courts are not constitutionally permitted to increase separate jury verdicts in a personal injury case, regardless of the law of joint and several liability or any principle of contribution. By increasing the jury verdict against Petitioners in this case, the Illinois Supreme Court patently violated this principle and thereby deprived Petitioners of their fundamental rights to due process and equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution. Although this Court cannot hope to remedy every constitutional deprivation, the enormous amount of the liability unconstitutionally imposed on Petitioners,[6] the fundamental nature of the right to a jury trial ("the most transcendent privilege which any subject can enjoy"), and the dangerous precedent set for similar constitutional deprivations in every contribution case makes this case worthy of this Court's review. Accordingly, Petitioners respectfully request that the instant Petition for Writ of Certiorari to the Supreme Court of Illinois be granted.

Respectfully submitted,

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[6] Petitioners Umbrella carrier has paid Respondent all but $1,000,000 of the increased award. However, that carrier has now sued Petitioners seeking to get its money back.